

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

MAY 03 2021

PSC SC
MAIL / DMS

BELLSOUTH)
TELECOMMUNICATIONS, LLC d/b/a)
AT&T North Carolina and d/b/a AT&T)
South Carolina,)
Complainant,)
v.)
DUKE ENERGY PROGRESS, LLC,)
Defendant.)

Proceeding No.: 20-293
Bureau ID No.: EB-20-MD-004

**DUKE ENERGY PROGRESS, LLC'S INITIAL BRIEF IN RESPONSE TO THE
ENFORCEMENT BUREAU'S MARCH 8, 2021 LETTER**

Eric B. Langley
Robin F. Bromberg
Robert R. Zalanka
LANGLEY & BROMBERG LLC
2700 U.S. Highway 280
Suite 240E
Birmingham, Alabama 35223
Telephone: (205)783-5750
Email: eric@langleybromberg.com
Email: robin@langleybromberg.com
Email: rylee@langleybromberg.com

April 8, 2021

PUBLIC VERSION

Table of Contents

I. AT&T RECEIVES MANY MATERIAL ADVANTAGES UNDER THE JOINT USE AGREEMENT THAT DEP'S CATV AND CLEC LICENSEES DO NOT ENJOY.....	1
A. Avoidance of Make-Ready Costs.....	4
B. Perpetual License.....	6
C. Avoidance of Permitting and Inspection Costs.....	7
D. Payment of "Tabulated" Costs for any Necessary Make-Ready.....	8
E. Safety Space.....	9
F. [REDACTED] of Reserved Space.....	10
G. Avoided Contingency Costs.....	12
H. Lowest Position in Communication Space.....	12
II. TELECOM RATE INPUTS	14
A. Net Cost of a Bare Pole.....	15
B. Carrying Charge Rate	16
1. DEP's Use of Electric Plant in Service versus AT&T's Use of Total Utility Plant.....	16
2. The Taxes Component and [REDACTED]	17
3. The Depreciation Component: DEP Proration of Mid-Year Depreciation.....	19
C. Space Allocation Factor	19
1. Average Feet of Usable Space Occupied.....	19
2. The Average Number of Attaching Entities is [REDACTED]	22
CONCLUSION	23

PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH)	
TELECOMMUNICATIONS, LLC d/b/a)	
AT&T North Carolina and d/b/a AT&T)	
South Carolina,)	
)	
Complainant,)	
)	
v.)	Proceeding No.: 20-293
)	Bureau ID No.: EB-20-MD-004
)	
DUKE ENERGY PROGRESS, LLC,)	
)	
Defendant.)	
)	

**DUKE ENERGY PROGRESS, LLC'S INITIAL BRIEF IN RESPONSE TO THE
ENFORCEMENT BUREAU'S MARCH 8, 2021 LETTER**

Pursuant to the Enforcement Bureau's March 8, 2021 letter ruling (the "Order"), which was issued pursuant to 47 C.F.R § 1.732, Duke Energy Progress, LLC ("DEP") hereby submits this Initial Brief.

ARGUMENT

I. AT&T RECEIVES MANY MATERIAL ADVANTAGES UNDER THE JOINT USE AGREEMENT THAT DEP'S CATV AND CLEC LICENSEES DO NOT ENJOY.

The March 8, 2021 letter states:

To the extent you contend that [AT&T] has advantages or disadvantages as compared with CATV and CLEC companies with licenses to attach to those poles, list each specific advantage or disadvantage and record evidence regarding the specific advantage or disadvantage, including citations to provisions in the parties' joint use agreement (JUA) and in Duke's pole attachment agreements with third parties.... In addition, cite to any authorities, including Commission or Bureau orders, that support your position regarding such advantages or disadvantages.

March 8, 2021 Letter at p. 2. As set forth in great detail in DEP's Answer (filed November 13, 2020), AT&T most definitely receives significant net benefits under the parties' joint use

PUBLIC VERSION

agreement (Amended and Restated Agreement Covering Joint Use of Poles Between Carolina Power & Light Company and BellSouth Telecommunications, Inc.) (the “JUA”) that “materially advantage[] [AT&T] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.” *See* 47 C.F.R. § 1.1413(b). The following chart summarizes those benefits and sets forth the net financial value to AT&T of each benefit:

	Advantage of DEP/AT&T JUA	Comparable Pole License Agreement Provision for DEP’s CLEC/CATV Licensees	Value of Net Material Advantage to AT&T	
			Annual Net Basis	Annual Net Per-Pole Basis
A. Avoided Make-Ready Costs.	As a result of the built-to-suit pole network created pursuant to the JUA, AT&T has avoided the make-ready costs it would have incurred under a pole license agreement.	CLECs and CATVs are required to pay for any make-ready required to accommodate their proposed attachment on a DEP pole.		
B. Perpetual license.	Even in the event of termination of the JUA, DEP must allow AT&T to maintain its existing attachments made pursuant to the JUA on DEP’s poles.	CATV and CLEC licensees are required to remove their attachments from DEP’s poles upon termination of the pole license agreement.		
C. Avoided Permitting and	As a result of the built-to-suit pole network created pursuant to the JUA,	CLECs and CATVs are required to pay for all permitting and		

¹ Answer, Ex. E at DEP000337-38, DEP000375 (Metcalf Decl. ¶¶ 28-31, Ex. E-4.1).

² *Id.*

³ *Id.* at DEP000333-34, DEP000361 (Metcalf Decl. ¶ 18-21, Ex. E-2).

⁴ *Id.*

⁵ *Id.* at DEP000335-37, DEP000377 (Metcalf Decl. ¶¶ 25-27, Ex. E-4.2).

⁶ *Id.*

PUBLIC VERSION

Inspection Costs.	AT&T has avoided the permitting, and inspection costs it would have incurred under a pole license agreement.	inspection costs related to their proposed attachments.		
D. Payment of tabulated versus actual costs.	AT&T does not pay the actual cost DEP incurs to modify or replace a jointly used pole. Instead, AT&T pays drastically lower “tabulated” costs.	CATVs and CLECs are required to pay the actual, work order cost of any modification or pole replacement necessary to accommodate their attachment and maintain the safety space.	N/A	Quantified on a per-pole basis in Section I.B. <i>infra</i> .
E. Safety space.	DEP built out its pole network with poles tall enough to include the safety space between DEP and AT&T facilities. AT&T was the original cost causer of that safety space.	Where a DEP pole has no existing attachers, a CATV or CLEC must pay for the incremental cost of the replacement pole necessary to accommodate the proposed attachment, including the incremental cost of the 40-inch safety space.		
F. [REDACTED] of reserved space.	The previous JUA allocated AT&T [REDACTED] of space per DEP joint use pole. AT&T continues to enjoy this allocation under the parties’ current JUA.	CATV and CLEC licensees are allocated one foot of space per pole.		

⁷ *Id.* at DEP000339-41, DEP000382 (Metcalf Decl. ¶¶ 32-37, Ex. E-5A).

⁸ *Id.*

⁹ *Id.* at DEP000342, DEP000384 (Metcalf Decl. ¶ 38, Ex. E-5B).

¹⁰ *Id.*

PUBLIC VERSION

G. Avoided contingency costs.	AT&T has avoided certain contingency costs that it would have incurred absent the JUA's perpetual license provision, including procuring poles and acquiring land and storage equipment to store the poles in inventory in reasonable proximity to the service areas at issue.	CATV and CLEC licensees are required to remove their attachments from DEP's poles upon termination of the pole license agreement.		
H. Lowest position in communication space.	Under the previous JUA, AT&T obtained the right to the lowest position in the communication space on DEP's poles. AT&T retained this right under the parties current JUA.	CATV and CLEC licensees must attach above AT&T's reserved space.	N/A	N/A

A. Avoidance of Make-Ready Costs.

Pursuant to the JUA, DEP has built and maintained—and continues to build and maintain—a network of poles that are much taller and stronger than necessary to provide electric service.¹³ Because AT&T made its attachments on a network of DEP poles that were built to specifically accommodate AT&T, AT&T has avoided significant make-ready costs that it would

¹¹ *Id.* at DEP000334-35, DEP000366 (Metcalf Decl. ¶¶ 22-24, Ex. E-3).

¹² *Id.*

¹³ See Answer at ¶ 8, 16; *id.* at Ex. A, DEP000249-50 (Freeburn Decl. ¶¶ 11-12); *id.* at Ex. B, DEP000284-85 (Hatcher Decl. ¶¶ 8-9); *id.* at Ex. C, DEP000297-98 (Burlison Decl. ¶¶ 11-12); *id.* at Ex. 1, DEP000120 (Joint Use Agreement, Article I.K.) (defining “standard joint use pole” as a 40-foot pole that “meets the requirements of the Code for support and clearance of electric supply and communications conductors”); *id.* at Ex. 2, DEP000141 (1977 Joint Use Agreement, Article I.B.) (defining “standard joint use pole”).

PUBLIC VERSION

have otherwise incurred under a pole license agreement.¹⁴ AT&T was almost always the first communications attachment on DEP's poles (within the parties' overlapping service territories), and but for the JUA's requirement of taller joint use poles, AT&T would have been required to change out virtually every DEP pole to which it desired to make attachments.¹⁵ DEP's CATV and CLEC licensees, in contrast, take DEP's poles as they find them and, under their pole license agreements, are required to bear the actual cost of any pole replacements or modifications that are necessary to accommodate their attachments.¹⁶ The Commission has previously held that the avoidance of make-ready costs was a "unique benefit" under a joint use agreement that provided "prospective value" to the ILEC.¹⁷ After accounting for reciprocal benefits to DEP, the avoidance

¹⁴ See Answer at ¶¶ 8, 15, 16, 17; *id.* at Ex. A, DEP000249-50 (Freeburn Decl. ¶¶ 11-12); *id.* at Ex. B, DEP000286, DEP000287-88 (Hatcher Decl. ¶¶ 11, 15); *id.* at Ex. C, DEP000297-98, (Burlison Decl. ¶ 11); *id.* at Ex. E at DEP000337-38 (Metcalf Decl. ¶¶ 28-31).

¹⁵ See AT&T's Pole Attachment Complaint, Ex. C at ATT00045 (Peters Aff. ¶ 21) (noting that "in the early days of joint use [i.e., when DEP's network was initially constructed]...AT&T was the only consistent communications attacher on utility poles at that time").

¹⁶ See Answer at ¶¶ 16, 30; *see also* CATV-4 at DEP000597-98, DEP000610 (Article 11, Definitions App'x) (outlining make-ready requirements and broadly defining "make-ready" as "any work performed" to accommodate the licensee's attachments); *accord* CATV-8 at DEP001227-28, DEP001237 (Article 11, Definitions App'x); CATV-9 at DEP001255, DEP001264 (Article 11, Definitions App'x); CATV-10 at DEP001277-78, DEP001287 (Article 11, Definitions App'x); CLEC-4 at DEP000522-23, DEP000535 (Article 11, Definitions App'x); CLEC-18 at DEP001134-35, DEP001147 (Article 11, Definitions App'x); CATV-5 at DEP000680-81 (Section 3.06) (including pole replacements in make-ready requirements); *accord* CLEC-6 at DEP000651-52 (Section 3.6); CLEC-9 at DEP000757-58 (Section 3.06); CLEC-14 at DEP000915 (Section 3.06); WIRELESS-3 at DEP000620 (Section 3.6); WIRELESS-7 at DEP001300, DEP001305 (Sections 1.16, 5.3).

¹⁷ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7770-71 at ¶ 128 (Aug. 3, 2018) ("2018 Order") (stating that "similarly situated" presumption can be rebutted by demonstrating ILEC enjoys "material benefits" under joint use agreement, including "lower make-ready costs"); *Verizon Maryland LLC v. The Potomac Edison Company*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607, 13614-16 at ¶ 20 (Nov. 23, 2020) ("Verizon Maryland Order") (finding ILEC's avoidance of make-ready costs was a "material advantage" under joint use agreement); *Verizon Florida LLC v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1148-50 at ¶¶ 21, 22 & 23 (Feb. 11, 2015) ("Verizon Florida Order").

PUBLIC VERSION

of make-ready costs under the JUA provides AT&T with an annualized net benefit of [REDACTED]

[REDACTED]¹⁸

B. Perpetual License.

In the event of termination, Article XVII.B of the JUA provides:

Either party may terminate, upon one (1) year's notice in writing to the other party, the right to make additional Attachments. Any such termination of the right to make additional Attachments shall not, however, abrogate or terminate the right of either party to maintain the existing Attachments on the poles of the other and all such existing Attachments shall continue pursuant to and in accordance with the terms of this Agreement.¹⁹

AT&T, in essence, enjoys a perpetual license on DEP's poles even in the event of termination of the JUA (either for convenience or default).²⁰ In contrast, DEP's standard license agreements require CATVs and CLECs to remove their attachments upon termination:

Upon termination of this Agreement, Licensee shall, within sixty (60) days: (i) remove all of its Attachments from Licensors' Poles; and (ii) advise Licensors of the date on which such Attachments were removed and affected Poles repaired. If any Attachments are not so removed within sixty (60) days following such termination, Licensors shall have the right to: (a) remove Licensee's Attachments without liability, and Licensee shall reimburse Licensors for the associated costs plus an additional 50% of such costs; and (b) seek the payment of holdover fees, on a monthly basis, at the Pole Attachment License Fee rate.²¹

¹⁸ Answer, Ex. E at DEP000337-38, DEP000375 (Metcalf Decl. ¶¶ 28-31, Ex. E-4.1).

¹⁹ Answer, Ex. 1 at DEP000130 (JUA, Article XVII.B.).

²⁰ See Answer at ¶¶ 15, 21, 27, 38; *id.* at Ex. A, DEP000255 (Freeburn Decl. ¶ 22); *id.* at Ex. B, DEP000288-89 (Hatcher Decl. ¶ 16); *id.* at Ex. 1, DEP000130, DEP000129 (Joint Use Agreement, Articles XVII.B., XIV.A.).

²¹ Answer, Ex. 7 at DEP000223 (Exemplar CLEC Pole Attachment License Agreement, Section 17); *see also* CATV-4 at DEP000604 (Section 16.4.1) (requiring removal within 120 days of termination); *accord* CLEC-4 at DEP000529 (Section 16.4.1); CLEC-6 at DEP000658-59 (Section 7.3); CLEC-9 at DEP000764 (Section 7.3); CLEC-18 at DEP001141 (Section 16.4.1); WIRELESS-7 at DEP001316 (Section 17); CATV-5 at DEP000679, DEP000686 (Sections 2.1, 7.3) (providing DEP discretion to order removal and requiring removal within 120 days of termination); *accord* CLEC-14 at DEP000912-13, DEP000920-21 (Sections 2.1, 7.3); CATV-8 at DEP001232 (Section 16.4.1) (requiring removal within 180 days of termination); *accord*

PUBLIC VERSION

But for the perpetual license, AT&T would be required to remove its attachments from DEP's poles in the event of termination. This provides AT&T with a material advantage over its CATV and CLEC competitors.²² After accounting for reciprocal benefits to DEP, the perpetual license provides AT&T with an annualized net benefit of [REDACTED]²³ To quantify this benefit, DEP calculated the costs AT&T would incur to replace the network AT&T currently has in place on the joint use poles owned by DEP, as well as the costs that DEP would incur to replace the network DEP currently has in place on joint use poles owned by AT&T.²⁴

C. Avoidance of Permitting and Inspection Costs.

Under the JUA, AT&T is not required to follow DEP's permitting requirements applicable to CATVs and CLECs.²⁵ Further, when DEP inspects AT&T's attachments, AT&T does not bear the costs of those inspections. Instead, DEP absorbs those costs.²⁶ DEP's CATV and CLEC licensees, on the other hand, are required to bear the costs of DEP's permitting and inspection requirements.²⁷ The Commission has previously held that the avoidance of permitting and

CATV-9 at DEP001259 (Section 16.4.1); CATV-10 at DEP001282 (Section 16.4.1); WIRELESS-3 at DEP000629 (Section 7.3.2) (requiring removal within 90 days of termination).

²² See *Verizon Maryland Order*, 35 FCC Rcd at 13615, ¶ 20 (finding provision that allowed ILEC to remain attached to existing joint use poles following termination of joint use agreement was "material advantage" over other attachers, who "are required to remove all attachments prior to any specified termination date."); see also *Verizon Florida Order*, 30 FCC Rcd at 1149-50, ¶ 24 (characterizing "access" as a benefit under an ILEC's joint use agreement).

²³ Answer, Ex. E at DEP000333-34, DEP000361 (Metcalf Decl. ¶ 18-21, Ex. E-2).

²⁴ See Answer at ¶ 15; *id.* at Ex. E, DEP000333-34 (Metcalf Declaration ¶ 18-20).

²⁵ See Answer at ¶¶ 8, 10, 17; *id.* at Ex. A, DEP000254-55 (Freeburn Decl. ¶¶ 20-21); *id.* at Ex. B, DEP000286, DEP000291-92 (Hatcher Decl. ¶¶ 11, 21); *id.* at Ex. E, DEP000335-37 (Metcalf Decl. ¶¶ 25-27).

²⁶ See Answer, Ex. A at DEP000254-55 (Freeburn Decl. ¶¶ 20-21).

²⁷ See Answer at ¶ 17; *id.* at Ex. A, DEP000254-55 (Freeburn Decl. ¶¶ 20-21); see also **Permitting**: CATV-4 at DEP000585, DEP000592 (Sections 1.2, 7.1) (outlining permit requirement and application fees); accord CATV-8 at DEP001218, DEP001223 (Sections 1.2, 7.1); CATV-9 at DEP001245, DEP001250 (Sections 1.2, 7.1); CATV-10 at DEP001268, DEP001273 (Sections 1.2, 7.1); CLEC-4 at DEP000509-10, DEP000517 (Sections 1.2, 7.1); CLEC-18 at DEP001122,

PUBLIC VERSION

inspection costs was a “unique benefit” under a joint use agreement that provided “prospective value” to the ILEC.²⁸ After accounting for reciprocal benefits to DEP, the avoidance of permitting and inspection costs under the JUA provides AT&T a net annualized benefit of [REDACTED]

[REDACTED]²⁹

D. Payment of “Tabulated” Costs for any Necessary Make-Ready.

Under the JUA, AT&T is not required to pay the actual, work order cost of a make-ready pole replacement or a pole replacement required to correct AT&T’s NESC violations.³⁰ Instead, AT&T is only required to reimburse DEP for the scheduled (a/k/a “tabulated”) costs of the pole replacement.³¹ Currently, AT&T’s cost responsibility under either of these scenarios would be

DEP001129 (Sections 1.2, 7.1); CATV-5 at DEP000679 (Section 3.01); CLEC-6 at DEP000650 (Section 3.1); CLEC-9 at DEP000755-56 (Section 3.01) (outlining permitting requirements); *accord* CLEC-14 at DEP000913 (Section 3.01); WIRELESS-3 at DEP000618 (Section 3.1); WIRELESS-7 at DEP001304-05 (Sections 5.1, 5.2); **Inspections:** CATV-4 at DEP000596 (Section 9.5); CATV-5 at DEP000680 (Sections 3.04, 3.05); CATV-8 at DEP001226 (Section 9.5); CATV-9 at DEP001253 (Section 9.5); CATV-10 at DEP001276 (Section 9.5); CLEC-4 at DEP000521 (Section 9.5); CLEC-6 at DEP000651 (Sections 3.4, 3.5); CLEC-9 at DEP000756-57 (Sections 3.04, 3.05); CLEC-14 at DEP000914 (Sections 3.04, 3.05); CLEC-18 at DEP001133 (Section 9.5); WIRELESS-3 at DEP000619-20 (Sections 3.4, 3.5); WIRELESS-7 at DEP001308 (Section 7.1).

²⁸ *Verizon Florida Order*, 30 FCC Rcd at 1148-49, ¶¶ 21-22; *see also 2018 Order*, 33 FCC Rcd at 7770-71, ¶ 128 (stating that “similarly situated” presumption can be rebutted by demonstrating ILEC enjoys “material benefits” under joint use agreement, including “[no] inspection costs” and “[no] advance approval to make attachments”); *BellSouth Telecommunications d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Proceeding No. 19-187, 35 FCC Rcd 5321, 5328-29 at ¶ 14 (May 20, 2020) (“*AT&T Florida I Order*”) (finding exemption from permitting and inspection costs under joint use agreement material advantage to ILEC); *Verizon Maryland Order*, 35 FCC Rcd at 13614-16, ¶ 20 (finding ILEC’s avoidance of permitting and inspection costs were “material advantages” under joint use agreement).

²⁹ Answer, Ex. E at DEP000335-37, DEP000377 (Metcalf Decl. ¶¶ 25-27, Ex. E-4.2).

³⁰ *See* Answer at ¶ 17; *id.* at Ex. A, DEP000255-56 (Freeburn Decl. ¶¶ 23-24); *id.* at Ex. 1, DEP000123 (Joint Use Agreement, Article VII.F.4.); *id.* at DEP000124 (Joint Use Agreement, Article VII.F.6.b.); *id.* at Ex. 5, DEP000178 (Exhibit B Cost Schedule, Table I).

³¹ *See supra* note 30.

PUBLIC VERSION

██████ for a replacement involving a pole that is 50-foot or less in height.³² CATVs and CLECs, on the other hand, are required to pay the actual, work order cost for pole replacements.³³ In 2019, the average cost of a pole replacement for DEP was ██████. This means that, on average, AT&T pays ██████ less for pole replacements than its CATV and CLEC competitors.³⁵

E. Safety Space.

The JUA requires DEP to install and maintain a network of poles that are tall enough to include the safety space between DEP and AT&T's facilities.³⁶ But for the JUA, DEP would have installed poles that were only tall enough to meet its electric service needs, and AT&T—which was almost always the first communications attacher to DEP's poles³⁷—would have incurred significant costs in replacing DEP's poles with poles tall enough to accommodate AT&T's facilities and the required safety space.³⁸ Thus, the JUA greatly reduced AT&T's deployment costs.³⁹ In contrast, if DEP's CATV or CLEC licensees request attachment to a DEP pole that has no other third-party attachments (and therefore, no existing safety space), the CATV or CLEC

³² See Answer, Ex. 5 at DEP000178 (Exhibit B Cost Schedule, Table I).

³³ See *supra* note 16; see also Answer at ¶ 17; *id.* at Ex. A, DEP000250, DEP000256 (Freeburn Decl. ¶¶ 12, 24).

³⁴ See Answer at ¶ 17; *id.* at Ex. A, DEP000256-57 (Freeburn Decl. ¶ 25).

³⁵ See, e.g., 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128 (stating that “paying significantly lower make-ready costs” under a joint use agreement is a “material benefit”); *Verizon Florida Order*, 30 FCC Rcd at 1150-51, ¶ 24 (identifying avoidance of make-ready costs as a benefit not afforded to other attachers).

³⁶ See *supra* note 13; see also Answer at ¶ 25; *id.* at Ex. A, DEP000252-53 (Freeburn Decl. ¶¶ 17-18); *id.* at Ex. B, DEP000285 (Hatcher Decl. ¶ 9); *id.* at Ex. C, DEP000297-98 (Burlison Decl. ¶ 11).

³⁷ See *supra* note 15.

³⁸ See Answer at ¶ 25; *id.* at Ex. A, DEP000250, DEP000252-53 (Freeburn Decl. ¶¶ 12, 17-18); *id.* at Ex. B, DEP000285, DEP000288, DEP000289-90 (Hatcher Decl. ¶¶ 9, 15, 18); *id.* at Ex. C, DEP000296-298 (Burlison Decl. ¶¶ 6-13); *id.* at Ex. D, DEP000309 (Harrington Decl. ¶ 17); *id.* at Ex. E, DEP000330-31, DEP000339-41 (Metcalf Decl. ¶¶ 11, 32-37).

³⁹ See Answer, Ex. E at DEP000337-38, DEP000339-41 (Metcalf Decl. ¶¶ 29-31, 32-37).

PUBLIC VERSION

would be required to pay for the incremental cost of the replacement pole necessary to host the proposed attachment and the required safety space.⁴⁰ The Commission has recognized that the ability to deploy on built-to-suit pole networks is a material benefit under joint use agreements.⁴¹ After accounting for reciprocal benefits to DEP, the safety space on DEP's poles provides AT&T with an annualized net benefit of [REDACTED].⁴²

AT&T disputes the fact that DEP installed taller poles "just to accommodate AT&T" and argues that DEP constructed its pole network with potential third-party attachers in mind.⁴³ To the contrary, but for the JUA, DEP could never have justified the cost of constructing a network of poles that were taller than necessary for its electric service needs.⁴⁴

F. [REDACTED] of Reserved Space.

An additional benefit AT&T enjoys under the joint use relationship is that it was allocated [REDACTED] of space per DEP joint use pole under the previous JUA.⁴⁵ But AT&T is not limited to

⁴⁰ See *supra* note 16.

⁴¹ See, e.g., *Verizon Florida Order*, 30 FCC Rcd at 1148-49, ¶¶ 21-22 (acknowledging that ILEC benefitted from electric utility's installation of taller joint use poles), 1150 at ¶ 24 (acknowledging that ILEC avoided make-ready costs for "its 67,000 attachments" because electric utility installed taller joint use poles); *Verizon Maryland Order*, 35 FCC Rcd at 13614-15, ¶ 20 (acknowledging that "guaranteed access" provision, which required installation of taller joint use poles, provided ILEC with a "material advantage" over CLEC and CATV attachers).

⁴² Answer, Ex. E at DEP000339-41, DEP000382 (Metcalf Decl. ¶¶ 32-37, Ex. E-5A).

⁴³ See AT&T's Reply Legal Analysis at p. 13.

⁴⁴ Answer, Ex. A at DEP000249-50, DEP000252-53 (Freeburn Decl. ¶¶ 11-12, 17-18); *id.* at Ex. B, DEP000284-85 (Hatcher Decl. ¶¶ 8-9); *id.* at Ex. C, DEP000296-98 (Burlison Decl. ¶¶ 7-14); *id.* at Ex. D, DEP000309 (Harrington Decl. ¶ 17); see also *2011 Order*, 26 FCC Rcd at 5302, ¶ 144 n.433 ("[The Commission] agree[s] with Pecaro...that it would typically not be economically rational for utilities to build taller poles solely for the possibility of accommodating attachers and therefore incur unreimbursed capital costs...").

⁴⁵ See Answer at ¶¶ 18, 19. The parties' previous joint use agreement allocated the lowermost [REDACTED] of communication space to AT&T. Answer, Ex. 2 at DEP000140 (1977 Joint Use Agreement, Article I.A.2). This space allocation was reaffirmed in the parties' current joint use agreement. *Id.* at Ex. 1, DEP000121 (Joint Use Agreement, Article III.B) ("The parties agree that

PUBLIC VERSION

the generous space allocation in the previous JUA—the current JUA allows AT&T to occupy as much space as it wants without additional charge.⁴⁶ This stands in stark contrast to DEP’s CATV and CLEC licensees, which pay a per attachment rate premised upon a single foot of occupancy.⁴⁷ DEP’s field data indicates that AT&T actually occupies [REDACTED] of space per DEP pole on average.⁴⁸ Though AT&T disputes that its space allocation is a material benefit, Commission precedent has consistently recognized otherwise.⁴⁹ After accounting for reciprocal benefits to DEP, AT&T’s space allocation under the joint use relationship provides AT&T with an annualized net benefit of [REDACTED]⁵⁰

all existing Attachments to poles jointly used by the parties shall continue to exist in their current condition as of the date of this Agreement...”).

⁴⁶ See Answer at ¶ 8 n.10; *id.* at Ex. 1, DEP000121 (Joint Use Agreement, Article III.A.) (“The pole space may be used by either party for the purpose of installing and maintaining Attachments if the requirements of the Code are met...so long as such use does not unreasonably interfere with the use being made by the other party.”).

⁴⁷ See 47 C.F.R. § 1.1410; CATV-4 at DEP000595 (Section 9.2.1) (providing licensee “only one position per pole”); *accord* CATV-8 at DEP001225 (Section 9.2.1); CATV-9 at DEP001252 (Section 9.2.1); CATV-10 at DEP001275 (Section 9.2.1); CLEC-4 at DEP000520 (Section 9.2.1); CLEC-18 at DEP001132 (Section 9.2.1); CATV-5 at DEP000677, DEP000684 (Sections 1.01, 6.1) (defining “attachment” to mean “a single messenger strand (support wire) system” and charging rental rate on a per-attachment basis); *accord* CLEC-14 at DEP000911, DEP000919 (Sections 1.01, 6.1); CLEC-6 at DEP000647, DEP000657 (Sections 1.01, 6.1) (defining “attachment” to mean “authorized contact(s) on a pole to accommodate a single all dielectric self-supporting fiber... or a single messenger strand...system” and charging rental rate on a per-attachment basis); *accord* CLEC-9 at DEP000753, DEP000762 (Sections 1.01, 6.1).

⁴⁸ See Answer at ¶¶ 12, 25; *id.* at Ex. A, DEP000248 (Freeburn Decl. ¶ 9); DEP’s Supplemental Interrogatory Responses, Ex. 4 at DEP001381 (Survey Results). AT&T has failed to provide any data rebutting DEP’s calculation of the amount of space AT&T actually occupies on jointly used poles owned by DEP.

⁴⁹ 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128 (“similarly situated” presumption can be rebutted by demonstrating that an ILEC enjoys “material benefits” under the joint use agreement, such as “guaranteed space on the pole”); *Verizon Florida Order*, 30 FCC Rcd at 1148-50, ¶¶ 21, 22 & 23 (acknowledging four-foot space allocation as benefit under joint use agreement); *AT&T Florida I Order*, 35 FCC Rcd at 5328, ¶ 14 (acknowledging four-foot space allocation as “significant benefit” under joint use agreement); *Verizon Maryland Order*, 35 FCC Rcd at 13615, ¶ 20 (describing ILEC’s space allocation on electric utility’s poles as a “material advantage”).

⁵⁰ Answer, Ex. E at DEP000342, DEP000384 (Metcalf Decl. ¶ 38, Ex. E-5B).

PUBLIC VERSION

G. Avoided Contingency Costs.

AT&T has avoided certain contingency costs that it would have incurred in the absence of the JUA's perpetual license provision.⁵¹ As a result of the risk of termination, but for the JUA, AT&T would have incurred costs to be "ready" to build-out, if necessary, its own network of poles (or pursue some alternative means for providing service).⁵² Such contingency costs would include procuring poles, and potentially acquiring land and storage equipment to store the poles in inventory in reasonable proximity to the service areas at issue.⁵³ AT&T has avoided these costs because of the JUA's perpetual license provision, which allows AT&T to remain attached to DEP's poles even in the event of termination. CATV and CLEC licensees, on the other hand, are required to remove their attachments from DEP's poles upon termination of the pole license agreement.⁵⁴ As referenced *supra*, the Commission recently found a perpetual license provision to provide an ILEC with a "material advantage" over its CATV and CLEC competitors.⁵⁵ After accounting for reciprocal benefits to DEP, the avoidance of contingency costs provides AT&T with an annualized net benefit of [REDACTED]⁵⁶

H. Lowest Position in Communication Space.

AT&T enjoys the right to occupy the lowest position in the communication space on DEP's joint use poles.⁵⁷ This benefits AT&T through ease of access to its attachments, ability to sag

⁵¹ See Answer at ¶ 15; *id.* at Ex. 1, DEP000130, DEP000129 (Joint Use Agreement, Articles XVII.B., XIV.A.) (creating perpetual license); *id.* at Ex. B, DEP000286, DEP000288-89 (Hatcher Decl. ¶¶ 11, 16); *id.* at Ex. E, DEP000334-35 (Metcalf Decl. ¶¶ 22-24).

⁵² See Answer, Ex. E at DEP000334-35 (Metcalf Decl. ¶¶ 22-24).

⁵³ See *id.*

⁵⁴ See *supra* note 21.

⁵⁵ See *Verizon Maryland Order*, 35 FCC Rcd at 13615, ¶ 20.

⁵⁶ See Answer, Ex. E at DEP000334-35, DEP000366 (Metcalf Decl. ¶¶ 22-24, Ex. E-3).

⁵⁷ See Answer at ¶¶ 18, 19. AT&T obtained the right to occupy the lowest position in the communication space under the parties' previous joint use agreement. See Answer, Ex. 2 at

PUBLIC VERSION

cable, and ability to transfer attachments to new poles for maintenance and upgrade projects faster and more easily than higher-mounted communication attachments.⁵⁸ CATV and CLEC licensees must either attach above AT&T's reserved space (which makes their attachments more difficult to access and gives them less ability to sag their cable), or they can attach in AT&T's space—subject to AT&T's right to later reclaim the space without having to bear the costs of rearrangements or capacity expansion.⁵⁹ Commission precedent recognizes that occupying the lowest position on the pole provides ILECs with a competitive advantage over CATVs and CLECs.⁶⁰

Despite the fact that the Commission has previously held that the right to the lowest position in the communications space is a material advantage for ILECs, AT&T argues that its

DEP000140 (1977 Joint Use Agreement, Article I.A.2.). AT&T retained this right under the parties' current joint use agreement. *See id.* at Ex. 1, DEP000121 (Joint Use Agreement, Articles III.A., III.B.).

⁵⁸ *See* Answer at ¶¶ 18, 19; *id.* at Ex. A, DEP000253-54 (Freeburn Decl. ¶ 19); *id.* at Ex. C, DEP000300 (Burlison Decl. ¶ 17).

⁵⁹ *See, e.g.,* CATV-4 at DEP000586 (Sections 1.4.3, 1.4.4) (requiring licensee to either remove attachments or pay for additional capacity where there is no room for an additional ILEC attachment); *accord* CATV-8 at DEP001219-20 (Sections 1.4.3, 1.4.4); CATV-9 at DEP001246-47 (Sections 1.4.3, 1.4.4); CATV-10 at DEP001269-70 (Sections 1.4.3, 1.4.4); CLEC-4 at DEP000511-12 (Sections 1.4.3, 1.4.4); CLEC-18 at DEP001123-24 (Sections 1.4.3, 1.4.4); CATV-5 at DEP000670 (Section 2.1) (allowing DEP to deny attachment requests where proposed attachments cannot be accommodated because of “existing or committed attachments of others within the available communication space”); *accord* CLEC-6 at DEP000649 (Section 2.1); CLEC-9 at DEP000755 (Section 2.1); CLEC-14 at DEP000912-13 (Section 2.1); WIRELESS-3 at DEP000617-18 (Section 2.1); WIRELESS-7 at DEP001333-36 (Exhibit D) (“Antenna locations cannot violate existing joint use allocations or agreements with other joint use parties.”).

⁶⁰ *2018 Order*, 33 FCC Rcd at 7770-71, ¶ 128 (explaining that “similarly situated” presumption can be rebutted by demonstrating “material benefits” under the joint use agreement, such as the right to “preferential location” on poles); *Verizon Florida Order*, 30 FCC Rcd at 1148-50, ¶¶ 21, 22 & 23 (joint use agreement's allocation of lowest four feet of usable space on poles was benefit to ILEC because it “is easier to access than the space used by [the ILEC's] competitors” and “reduces [the ILEC's] installation and maintenance costs”); *AT&T Florida I Order*, 35 FCC Rcd at 5328-29, ¶ 14 (guaranteed lowest space on the pole was an advantage because allowed ILEC's employees to “work in a safer area of the pole,” “identify and access [the ILEC's] attachments more easily,” and “use less expensive bucket trucks with shorter reach”).

PUBLIC VERSION

guaranteed lowest position in the communications space is actually a disadvantage.⁶¹ However, AT&T provides no valuation of that supposed disadvantage—thus failing to meet its burden of proof under the *2011 Order*.⁶²

II. TELECOM RATE INPUTS

AT&T made absolutely no effort whatsoever to carry its burden of proof for periods governed by the *2011 Order*. Neither AT&T's complaint nor its reply even seem to acknowledge the important distinction between periods governed by the *2011 Order* vs. the *2018 Order*. Specifically, AT&T failed to quantify any of the benefits it enjoys under the JUA, which is a fatal omission under the *2011 Order*. For example, in the *Verizon Florida* proceedings, the Commission dismissed Verizon's complaint—even in the face of a \$36.22 per pole rate (that was nearly three times the old telecom rate and more than four times the new telecom rate)—because:

...Verizon [] adduced insufficient evidence to support a finding that the Agreement Rates are unreasonable, or for the Commission to set a just and reasonable rate. Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, but **it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time. Verizon provides no evidence regarding the value of access to Florida Power's poles or occupying the lowest usable space on each pole. Verizon likewise made no attempt to estimate the costs Florida Power incurred by installing taller poles to accommodate Verizon. For its 67,000 attachments, Verizon was not required to pay make-ready costs and post-attachment inspection fees that competitive LECs must pay, yet Verizon has made no attempt to quantify the expenses it avoided under the Agreement.** Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable.⁶³

⁶¹ See AT&T's Pole Attachment Complaint at ¶ 21; *id.* at Ex. C, ATT00045-46 (Peters Aff. ¶¶ 20-23).

⁶² See *Verizon Florida Order*, 30 FCC Rcd at 1149-50, ¶ 24 (dismissing complaint because ILEC failed to quantify the benefits it receives under the joint use agreement).

⁶³ *Id.* (emphasis added).

PUBLIC VERSION

Given AT&T's abject failure to carry its burden with respect to periods governed by the *2011 Order*, the Commission should not even consider whether or how the telecom rate applies to periods governed by the *2011 Order*.

The March 8, 2021 letter states:

[T]he parties shall confer on the proper calculation of the new telecom rate and the pre-existing (old) telecom rate for each of the years at issue and jointly prepare a summary document identifying those input values on which the parties agree....The parties shall submit that summary document with their opening briefs.

With respect to those inputs to the new telecom rate and the pre-existing (old) telecom rate formula that are disputed, explain in detail your contention as to the proper determination of the disputed input, citing all record evidence, including information disclosed in discovery, and all authorities supporting your determination of the value of that input. To the extent the parties continue to dispute certain inputs your briefs should include a discussion of the topics listed in Appendix A hereto.

March 8, 2021 Letter at p. 2. The summary document referenced in the Commission's letter is attached hereto as Exhibit A. DEP's positions with respect to the disputed rate formula inputs, including the specific issue raised in Appendix A of the Commission's letter, are addressed in detail below, and in Exhibit B hereto. The differences in the parties' annual pole cost calculations are itemized and explained in detail in the declaration of Dana Harrington.⁶⁴ Importantly, the way DEP calculates the net cost of a bare pole and the carrying charge for purposes of this proceeding is identical to the way DEP calculates those figures for purposes of its annual billings to CATV and CLEC licensees.⁶⁵

A. Net Cost of a Bare Pole

The only disputed input with respect to the net cost of a bare pole is the ADIT related to FERC Account 364. An overview of the parties' positions is provided in Exhibit B hereto. The

⁶⁴ See Answer, Ex. E at DEP000305-08 (Harrington Decl. ¶¶ 11-15).

⁶⁵ See *id.* at DEP000315 (Harrington Decl. Ex. D-3).

PUBLIC VERSION

parties' dispute regarding ADIT related to FERC Account 364 centers on the fact that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Carrying Charge Rate

All components of the carrying charge other than the rate of return are in dispute. AT&T has stipulated to the rates of return presented by DEP. An overview of the parties' respective calculations of the disputed carrying charge inputs is provided in Exhibit B hereto.

1. DEP's Use of Electric Plant in Service versus AT&T's Use of Total Utility Plant.

DEP's use of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁶ See *id.* at DEP000306-07 (Harrington Decl. ¶12); AT&T's Reply Legal Analysis, Ex. A at ATT00350-51 (Rhinehart Decl. ¶ 8).

⁶⁷ See Answer, Ex. D at DEP000306-07 (Harrington Decl. ¶ 12).

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.* at DEP000306-08 (Harrington Decl. ¶¶ 12-13).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In

any event, Mr. Rhinehart states that whether Electric Plant in Service or Total Utility Plant is used ultimately has a minimal impact on the total annual telecom rate (between \$0.11 to \$0.13).⁷¹

2. The Taxes Component and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷¹ See *id.* at DEP000306-07 (Harrington Decl. ¶ 12).

⁷² [REDACTED]

⁷³ See *TeleCable of Piedmont, Inc. v. Duke Power Co.*, 10 FCC Rcd 10898, 10900 at ¶ 12 (Jun. 15, 1995) (“The important goal here is to ensure that like kind figures... are used in the calculation.”).

⁷⁵ AT&T's Reply Legal Analysis, Ex. A at ATT00351 (Rhinehart Aff. ¶ 9).

PUBLIC VERSION

3. The Depreciation Component: DEP Proration of Mid-Year Depreciation.

When DEP has knowledge of a mid-year depreciation rate change, DEP prospectively prorates that figure and holds it constant for the billing period.⁷⁶ DEP does so in order to mitigate the lag between the age of data used in the rate calculation and the rental period to which the rate applies.⁷⁷ For example, a depreciation rate change effective on July 1, 2019 would be prorated as six months on the former rate plus six months on the new rate within the 2019 pole rental rate calculation.⁷⁸

C. Space Allocation Factor

Both parties' calculations utilize the Commission's presumptions regarding: (1) the average feet of unusable space per pole; and (2) average pole height.⁷⁹ See 47 C.F.R. § 1.1410. The two inputs with respect to the space factor that are contested are: (1) the average amount of usable space occupied by AT&T's attachments; and (2) the average number of attaching entities.

1. Average Feet of Usable Space Occupied.

Based on evidence submitted by DEP, AT&T occupies approximately [REDACTED] of space per DEP pole on average.⁸⁰ This is a combination of the [REDACTED] of space AT&T actually occupies on average (based on survey data from 1,039 DEP poles to which AT&T is attached), plus 40"

⁷⁶ Answer, Ex. D at DEP000304 (Harrington Decl. ¶ 8).

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ Compare Answer, Ex. D at DEP000315 (Harrington Decl. Ex. D-3) with AT&T's Pole Attachment Complaint at ¶ 31; *id.* at ATT00004 (Rhinehart Aff. ¶ 6); AT&T's Reply Legal Analysis, Ex. A at ATT00368 (Rhinehart Aff. Ex. R-5).

⁸⁰ See Answer at ¶ 12. In calculating AT&T's rates under the Commission's rate formulas, DEP actually used a more conservative [REDACTED] space occupied input. See *id.* at ¶ 12 n.40.

PUBLIC VERSION

(3.33 feet) of safety space.⁸¹ AT&T claims that it only occupies one foot of space per DEP pole on average, but AT&T has not produced any data in support of its claim or to contradict the data submitted by DEP and, instead, relies upon the FCC's presumption.⁸²

a. Actual Space Occupied

The previous JUA allocated [REDACTED] of space to AT&T, and AT&T continues to enjoy this allocation under its current JUA.⁸³ Make-ready surveys performed on 1,039 DEP poles to which AT&T is attached have revealed that AT&T actually occupies, on average, at least [REDACTED] of usable space.⁸⁴

The Enforcement Bureau's March 8, 2021 letter asks: "Whether the pole surveys DEP produced in discovery provide statistically valid samples of data regarding pole height, attachment height, and midspan height." March 8, 2021 Letter at p. 4. As an initial matter, DEP is only offering the data for the limited purpose of establishing the average height of AT&T's highest attachment on each DEP pole that AT&T occupies. This average attachment height of [REDACTED] when paired with the Commission's presumption that the lowest point of attachment on a pole is 18 feet, means that AT&T, either through multiple attachments and/or through heavy attachments that require more space due to mid-span sag, occupy [REDACTED] of space.⁸⁵ The geographic overlay of the data points within this sample are distributed throughout DEP's service area and were selected by third parties (entities seeking to make attachment to a pole), which contributes to the

⁸¹ See Answer at ¶ 12; *id.* at Ex. A, DEP000248, DEP000250-51, DEP000252 (Freeburn Decl. ¶¶ 9, 13, 17); *id.* at Ex. B, DEP000287 (Hatcher Decl. ¶ 14); DEP's Supplemental Interrogatory Responses, Ex. 4 at DEP001381 (Survey Results).

⁸² See AT&T's Pole Attachment Complaint at ¶ 25; AT&T's Reply Legal Analysis at p. 11 (arguing that "[n]ew telecom rates for AT&T must be calculated—as they are for AT&T's competitors—based on the Commission's presumptive 1-foot input for pole space occupied").

⁸³ See *supra* note 45.

⁸⁴ See *supra* note 91.

⁸⁵ See *supra* note 91.

PUBLIC VERSION

randomness of the sample. The data points were not selected by DEP, which eliminates the possibility of data manipulation. This data, if it incorrectly expresses AT&T's average attachment height at all, would likely understate AT&T's actual utilization of DEP's poles. The sample of 1,039 poles would skew toward areas where there is more competition for space (given that each of these poles was surveyed/measured pursuant to a third-party attachment request). This means that space utilization is likely more efficient and more compressed on this sample than on average. In short, this data is generous to AT&T.

Though AT&T disputes that it occupies, on average, [REDACTED] feet of space on DEP's poles, AT&T has not presented any data to rebut the findings of DEP's make-ready surveys. AT&T has also failed to produce any data to support its claim that it only occupies one foot of space on DEP's poles. Instead, AT&T merely argues that the rebuttable one-foot presumptive space occupied input should be applied to its attachments because it is applied to CATV and CLEC attachments.⁸⁶ However, as set forth in DEP's answer, AT&T's attachments are not analogous to CATV and CLEC attachments. AT&T's attachments are among the "largest" and "heaviest" on DEP's joint use poles and generally have more sag than CATV and CLEC attachments (which is corroborated by the mid-span sag data in the above referenced pole surveys).⁸⁷

b. Safety Space

If the Commission replaces the JUA's cost sharing structure with one of its rate formulas, then the 40" (3.33 feet) of safety space on jointly used poles owned by DEP should be assigned to AT&T.⁸⁸ As explained in DEP's answer, DEP should not be required to bear the cost of the safety

⁸⁶ See AT&T's Reply Legal Analysis at p. 11.

⁸⁷ See Answer, Ex. A at DEP000251-52, DEP000263-65 (Freeburn Decl. ¶¶ 14-16, Ex. A-1).

⁸⁸ AT&T does not dispute that the safety space is typically 40" (3.33 feet). See, e.g., AT&T's Pole Attachment Complaint at ¶ 25.

PUBLIC VERSION

space on its own poles because: (1) from a cost-of-service ratemaking perspective, there is no rational justification for requiring DEP and its ratepayers to bear this cost;⁸⁹ (2) the Commission's decision to not allocate any portion of the safety space to CATVs and CLECs is predicated on the fact that ILECs and electric utilities share the cost of safety space under joint use agreements;⁹⁰ and (3) the authority relied upon by AT&T in arguing that DEP should bear this cost is factually distinguishable from the facts at issue in this proceeding.⁹¹ For all the reasons set forth in DEP's answer, DEP should not be forced to bear the cost of the safety space on its own poles; AT&T—the cost-causer of the safety space on DEP's poles—should bear that cost (and vice versa).⁹²

2. The Average Number of Attaching Entities is [REDACTED]

The average number of attaching entities (including DEP) on jointly used poles owned by DEP is [REDACTED].⁹³ This average is based on data collected by DEP's contractor during a 2017 audit of all DEP poles, and the [REDACTED] average applies only to those poles to which AT&T is attached.⁹⁴ In other words, this is not a system average based on statistical sampling; it is the actual average number of attaching entities based on an audit of all DEP poles to which AT&T is attached.

AT&T claims that the average number of attaching entities on DEP poles is 5.⁹⁵ AT&T relies solely on the Commission's presumptive input for average number of attaching entities in

⁸⁹ See Answer at ¶ 25; *id.* at Ex. A, DEP000252-53 (Freeburn Decl. ¶¶ 17-18); *id.* at Ex. B, DEP000284, DEP000289-90 (Hatcher Decl. ¶¶ 9, 18); *id.* at Ex. C, DEP000296-97 (Burlison Decl. ¶¶ 7-10); *id.* at Ex. D, DEP000309 (Harrington Decl. ¶ 17); *id.* at Ex. E, DEP000339-40 (Metcalf Decl. ¶ 33).

⁹⁰ See Answer at ¶ 25.

⁹¹ See Answer at ¶ 25; *id.* at Ex. A, DEP000252-53 (Freeburn Decl. ¶ 18); *id.* at Ex. B, DEP000285 (Hatcher Decl. ¶ 9); *id.* at Ex. C, DEP000297 (Burlison Decl. ¶¶ 8-10).

⁹² See Answer at ¶ 25.

⁹³ See Answer at ¶ 22; *id.* at Ex. A, DEP000260 (Freeburn Decl. ¶ 34); DEP's Supplemental Interrogatory Responses, Ex. 5 at DEP001383 (VentureSum AAE Findings).

⁹⁴ See *id.*

⁹⁵ See AT&T's Pole Attachment Complaint at ¶ 31; AT&T's Reply to DEP's Answer at ¶ 22.

PUBLIC VERSION

urbanized areas.⁹⁶ AT&T has not offered any data, analysis or argument to discredit the results of DEP's 2017 audit.⁹⁷ *See* 47 C.F.R. § 1.1409(d)(3) (requiring an attaching entity, when rebutting a utility's calculation of average number of attaching entities, to submit information demonstrating why the utility's calculation is incorrect).

CONCLUSION

For those reasons set forth above and in DEP's Answer, the Commission should deny all relief sought by AT&T.⁹⁸ AT&T has failed to meet its burden of proof under the *2011 Order* with respect to periods governed by the *2011 Order*. With respect to the period covered by the *2018 Order*, AT&T failed to even voice an objection to the cost-sharing methodology in the JUA until May 22, 2019. Further, as illustrated by the undisputed evidence submitted by DEP, the rates charged by DEP under the JUA are just, reasonable, and non-discriminatory in light of the material benefits AT&T receives under the JUA. If the Commission unwinds the cost-sharing provisions of the JUA at all, any alternative rates that the Commission sets should be consistent with the rates set forth in paragraphs 37 or 38 of DEP's Answer.

⁹⁶ *See* AT&T's Pole Attachment Complaint at ¶ 31; AT&T's Pole Attachment Complaint, Ex. A at ATT00004 (Rhinehart Aff. ¶ 6); AT&T's Reply Legal Analysis, Ex. A at ATT00353 (Rhinehart Aff. ¶ 12).

⁹⁷ *Verizon Maryland Order*, 35 FCC Rcd at 13625, ¶ 37 (accepting electric utility's calculation of average number of attachers that was lower than Commission's presumptive input and derived from statistical sampling); *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Proceeding No. 19-187, 2021 FCC LEXIS 124, at * 20, ¶ 18 (Jan. 14, 2021) ("*AT&T Florida II Order*") (accepting electric utility's calculation of average number of attaching entities, which was based on surveys of all joint use poles owned by the electric utility).

⁹⁸ To the extent the Commission wishes for DEP to provide attestation regarding any of the additional points addressed in this brief in response to the Commission's inquiries, DEP is happy to provide same.

PUBLIC VERSION

Respectfully submitted this 8th day of April, 2021.

s/ Eric B. Langley
Eric B. Langley
Counsel for Defendant,
Duke Energy Progress, LLC

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on this day, April 8, 2021, a true and correct copy of Duke Energy Progress, LLC's Initial Brief was filed with the Commission via ECFS and was served on the following (service method indicated):

Robert Vitanza Gary Phillips David Lawson AT&T SERVICES, INC. 1120 20th Street NW, Suite 1000 Washington, DC 20036 (by U.S. Mail)	Marlene H. Dortch, Secretary Federal Communications Commission 445 12th Street, SW Washington, DC 20554 (by overnight FedEx and ECFS)
Christopher S. Huther Claire J. Evans Frank Scaduto WILEY REIN LLP 1776 K Street NW Washington, DC 20006 chuther@wileyrein.com cevens@wileyrein.com fscaduto@wileyrein.com (by E-Mail)	Rosemary H. McEnery Lisa B. Griffin Lisa J. Saks Mike Engel Lisa Boehley Federal Communications Commission Market Disputes Resolution Division Enforcement Bureau 445 12 th Street, SW Washington, D.C. 20554 Rosemary.McEnery@fcc.gov Lisa.Griffin@fcc.gov Lisa.Saks@fcc.gov Lisa.Boehley@fcc.gov Michael.Engel@fcc.gov (by E-Mail)
Charlotte A. Mitchell, Chair North Carolina Utilities Commission 4325 Mail Service Center Raleigh, NC 27699-4300 (by U.S. Mail)	Justin T. Williams, Chairman Public Service Commission of South Carolina 101 Executive Center Dr., Suite 100 Columbia, South Carolina 29210 (by U.S. Mail)
Kimberly D. Bose, Secretary Federal Energy Regulatory Commission 888 First Street, NE Washington, DC 20426 (by U.S. Mail)	

s/ Eric B. Langley

Eric B. Langley

PUBLIC VERSION

Langley & Bromberg LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
(205) 783-5750
eric@langleybromberg.com
Counsel for Defendant,
Duke Energy Progress, LLC

Exhibit A**Undisputed or Stipulated Rate Inputs****Undisputed or Stipulated Net Cost of a Bare Pole Components**

Net Cost of a Bare Pole		
Input	Year	Amount
Total number of poles	2017	966,096
	2018	936,554
	2019	933,475
FERC Account 364	2017	\$733,477,308
	2018	\$756,893,557
	2019	\$855,785,431
Depreciation Related to FERC Account 364	2017	\$361,353,193
	2018	\$364,838,283
	2019	\$398,659,014

Net Cost of a Bare Pole Input: Accumulated Deferred Income Taxes (ADIT)*			
*Although the parties do not agree to the calculation of ADIT, they stipulate to the below inputs into the calculation of ADIT.			
	2017	2018	2019
Account 190(dr)	\$2,083,860,008	\$1,775,392,682	\$1,864,956
Account 281(cr)	0	0	0
Account 282(cr)	(\$3,902,880,700)	(\$2,555,356,409)	\$2,695,677,136
Account 283(cr)	\$1,504,298,151	\$1,102,510,086	\$1,287,627,619
Total (-190+(281 to 283))	\$3,323,318,843	\$1,882,473,813	\$2,118,348,475

Undisputed or Stipulated Carrying Charge Components

Rate of Return Component of Carrying Charge	
Year	Rate of Return
2017	7.49%
2018	7.17%
2019	7.09%

Depreciation Component of Carrying Charge*				
*Although the parties do not agree to the calculation of the depreciation component of the carrying charge, they stipulate to the following inputs with respect to the calculation of that component.				
Years	Distribution Plant	Accumulated Depreciation-Distribution	Accumulated Depreciation Acct 364, 365, 369	Distribution Plant Depreciation Rate
2017	\$5,886,275,167	\$2,899,918,382	\$1,113,764,075	5.4809%
2018	\$6,236,201,722	\$3,005,977,663	\$1,132,197,391	4.2646%
2019	\$6,944,764,142	\$3,235,148,353	\$1,279,188,992	3.9500%

Tax Component of Carrying Charge*			
*Although the parties do not agree to the calculation of the tax component of the carrying charge, they stipulate to the below inputs to the calculation of that component.			
Operating Taxes			
	2017	2018	2019
Account 408.1 Taxes other than Income Taxes	\$153,758,259	\$153,535,056	\$153,362,211
Account 408.1 Income Taxes - Federal	\$(53,582,117)	\$(91,946,206)	\$(66,292,964)
Account 408.1 Income Taxes - Other	\$(23,847,119)	\$2,562,304	\$(3,938,471)
Account 410.1 Provision for Deferred Income Taxes	\$1,223,186,084	\$1,186,870,107	\$843,871,407
Account 411.4 Investment Tax Credit Adjustment	(5,304,895)	(3,380,372)	\$(3,355,660)
Less Account 411.1 Provision for Deferred Income Taxes-Credit Adj.	\$840,004,091	\$70,715,065	\$623,018,430
Operating Taxes	\$454,206,121	\$486,925,824	\$300,628,093

A&G Component of Carrying Charge*	
*Although the parties do not agree to the calculation of the A&G component of the carrying charge, they stipulate to the General and Administrative Expense that is an input into the calculation of that component.	
	General and Administrative Expense
2017	\$340,665,951
2018	\$314,453,093
2019	\$383,438,701

O&M Component of Carrying Charge*			
*Although the parties do not agree to the calculation of the O&M component of the carrying charge, they stipulate to several inputs into the calculation of that component, which are provided below.			
	2017	2018	2019
Maintenance Expense	\$96,344,656	\$77,989,270	\$121,847,376
Accumulated Depreciation-Distribution	\$2,899,918,382	\$3,005,977,663	\$3,235,148,353
Investment Acct 364	\$733,477,308	\$756,893,557	\$855,785,431
Investment Account 365	\$1,036,683,565	\$1,103,550,463	\$1,208,423,459
Investment Account 369	\$490,565,449	\$488,412,861	\$681,775,180
Accumulated Depreciation Accounts 364, 365, 369	(\$1,113,764,075)	(\$1,132,197,391)	(\$1,279,188,992)

PUBLIC VERSION

Exhibit B**Disputed Rate Inputs**

ADIT Related to FERC Account 364			
Input	Year	DEP's Position⁹⁹	AT&T's Position¹⁰⁰
ADIT Related to FERC Account 364	2017	\$93,309,472	\$87,618,918
	2018	\$52,299,131	\$49,026,157
	2019	\$62,726,252	\$58,567,035

Carrying Charge Inputs			
Input	Year	DEP's Position¹⁰¹	AT&T's Position¹⁰²
Depreciation	2017	14.42%	14.13%
	2018	9.50%	12.09%
	2019	8.57%	8.48%
A&G	2017	2.98%	2.60%
	2018	2.32%	2.05%
	2019	2.64%	2.32%
O&M	2017	11.21%	10.99%
	2018	7.40%	7.33%
	2019	9.63%	9.53%
Taxes	2017	3.82%	3.46%
	2018	3.50%	3.17%
	2019	2.02%	1.82%

⁹⁹ See Answer, Ex. D at DEP000315 (Olivier Decl. Ex. D-3).

¹⁰⁰ AT&T's Reply Legal Analysis, Ex. A at ATT00368 (Rhinehart Aff. Ex. R-5).

¹⁰¹ See Answer, Ex. D at DEP000315 (Harrington Decl. Ex. D-3).

¹⁰² See AT&T's Reply Legal Analysis, Ex. A at ATT00368 (Rhinehart Aff. Ex. R-5).

Space Allocation Factor Inputs	
Input	Feet
Space Actually Occupied by AT&T	
Total Space Occupied by AT&T*	
Average Number of Attaching Entities	
Average feet of unusable space per pole**	24
Average feet of useable space per pole**	13.5
Average pole height**	37.5
<p>* Space Actually Occupied by AT&T [REDACTED] plus the 40" (3.33 feet) of safety space on DEF's poles. In DEP's answer, a more conservative space occupied input [REDACTED] was used to calculate AT&T's rates.</p> <p>**AT&T is apparently now taking the position that these Commission presumptions are in dispute. However, AT&T relied upon these presumptions in the filings it has submitted throughout this proceeding, and has submitted no data to rebut these presumptions.</p>	

PUBLIC VERSION

APPENDIX A
Confidential License Agreement Designations¹⁰³

Agreement	Bates Number Range
CATV-1	DEP000006-DEP000026
CATV-2	DEP000427-DEP000459
CATV-3	DEP000541-DEP000564
CATV-4*	DEP000583-DEP000614
CATV-5*	DEP000675-DEP000693
CATV-6	DEP000974-DEP001010
CATV-7	DEP001011-DEP001041
CATV-8*	DEP001216-DEP001240
CATV-9*	DEP001241-DEP001265
CATV-10*	DEP001266-DEP001290
CLEC-1	DEP000409-DEP000426
CLEC-2	DEP000027-DEP000072
CLEC-3	DEP000460-DEP000477
CLEC-4*	DEP000507-DEP000540
CLEC-5	DEP000565-DEP000582
CLEC-6*	DEP000647-DEP000675
CLEC-7	DEP000694-DEP000733
CLEC-8	DEP000734-DEP000752
CLEC-9*	DEP000753-DEP000773
CLEC-10	DEP000819-DEP000836
CLEC-11	DEP000837-DEP000870
CLEC-12	DEP000871-DEP000893
CLEC-13	DEP000894-DEP000910
CLEC-14*	DEP000911-DEP000930
CLEC-15	DEP001042-DEP001082
CLEC-16	DEP001083-DEP001099
CLEC-17	DEP001100-DEP001117
CLEC-18*	DEP001118-DEP001151
CLEC-19	DEP001152-DEP001169
CLEC-20	DEP001340-DEP001361
WIRELESS-1	DEP000073-DEP000110
WIRELESS-2	DEP000478-DEP000506
WIRELESS-3*	DEP000615-DEP000646
WIRELESS-4	DEP000774-DEP000818
WIRELESS-5	DEP000931-DEP000973

¹⁰³ The agreements bearing an asterisk were referenced in DEP's initial brief. These agreements were selected based on attachment count. The CATV agreements represent 98.5% of CATV attachments on DEP poles. The CLEC agreements represent 93% of CLEC attachments on DEP poles. The Wireless agreements represent 77.4% of wireless attachments on DEP poles.

PUBLIC VERSION

WIRELESS-6	DEP001170-DEP001215
WIRELESS-7*	DEP001291-DEP001339

